IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

O R D E R

Manohar Lal Pareek v. Union of India & Ors.

S.B.CIVIL WRIT PETITION NO.1374/1994
under Articles 226 and 227 of the Constitution of India.

Date of Order : 19th October, 2005

P R E S E N T
HON'BLE MR.JUSTICE GOVIND MATHUR

Mr. S.K.Nanda, for the petitioner.
Mr. Vineet Kumar Mathur, for the respondents.

BY THE COURT :

On being dismissed from services by an order dated 20.4.1991 passed by Commandant, 80 Battalion, Border Security Force (hereinafter referred to as "BSF"), petitioner preferred the present writ petition giving challenge to the order aforesaid.

The facts in brief giving rise to present petition are as follows:-

The petitioner was enrolled in BSF as a Water Carrier on 28.10.1988. A leave of 30 days commencing from 19.7.1990 to 17.8.1990 was sanctioned in favour of the petitioner by the Commandant, 80 Battalion, BSF. The petitioner while travelling with convoy arrived at BSF Transit Camp, Jammu developed high

fever and thus reported to BSF Hospital at Jammu Tawi on 20.7.190. The petitioner remained indoor patient at BSF Hospital from 20.7.1990 to 23.7.1990. On 23.7.1990 the petitioner was advised to continue treatment as the disease of pyrexia was diagnosed. The petitioner while continuing the treatment as prescribed spitted out blood and he was diagnosed as a case of Bil Koch's Chest. The petitioner in these circumstances made a request to the respondents for extension of his leave upto 18.9.1990. The Commandant, 80 Battalion BSF allowed medical rest to the petitioner upto 18.9.1990. After expiry of the period aforesaid the petitioner was further advised to undergo treatment, therefore, the petitioner again made a request to the respondents for extension of sick leave upto 18.10.1990. The petitioner failed to get sufficient recovery from illness, therefore, he continued to undergo the treatment upto December, 1990.

In the meantime the petitioner was served with a notice dated 8.11.1990 issued by the Second-in-Commandant, 80 Battalion, BSF to report at the nearest BSF Headquarter and to undergo treatment through the BSF authorities. It was also notified that in event of failure to report on duty action in accordance with the BSF Act shall be taken against him. The petitioner accordingly reported to I.G., Headquarter, BSF, Jodhpur wherefrom he was referred to undergo the treatment of tuberculosis at Government Hospital,

Jodhpur. The petitioner wherefrom proceeded to take treatment at Chest Hospital, Bikaner and this fact too was communicated to the respondents under a latter dated 28.1.1991.

The respondent Commandant, 80 Battalion, BSF by an order dated 23.10.1990 (Anx.R/4) appointed one man court of inquiry to inquire into the circumstances under which the petitioner was over staying on leave w.e.f. 18.8.1990 without sufficient cause. The petitioner was served with a notice to show cause dated 1.4.1991 conveying the tentative decision of the competent authority to place him under dismissal. The petitioner was directed to urge in his defence against the proposed action before 20.4.1991. The petitioner in pursuant to the notice dated 1.4.1991 said to have submitted an explanation on 15.4.1991 and also reported to the BSF Transit Camp, Jammu on 24.4.1991 wherefrom he was dispatched to his Battalion on 26.4.1991. On 29.4.1991 the petitioner was called by the Commandant of the Battalion and was apprised that the reply to show cause notice given by him was not received before 20.4.1991. It was also conveyed to the petitioner that his services stood terminated but at that time copy of the order terminating him was not supplied to him. The petitioner received copy of the order dated 20.4.1991 through the local police on 6.6.1991 at his home address.

The challenge is given to the order dated 20.4.1991 by the petitioner on the count that the same was passed in violation of the mandatory provisions of the BSF Act. According to counsel for the petitioner the court of inquiry was appointed under an order dated 23.10.1990 to inquire into the circumstances under which the petitioner over stayed on leave w.e.f. 18.8.1990. The court of inquiry failed to adhere the procedure prescribed under Rule 173(8) of the BSF Rules, 1969 (hereinafter referred to as "the Rules of 1969"). It is pointed out by counsel for the petitioner that Rule 173(8) of the Rules of 1969 specifically provides that the court of inquiry will afford the delinquent person an opportunity to know all that has been stated against him, cross examine any witnesses who have given evidence against him and make a statement and called witnesses in his defence. No such procedure was adopted by the respondents and no opportunity of defence as required under Rule 173 (8) of the Rules of 1969 was given to the petitioner.

A reply to the writ petition has been filed on behalf of the respondents stating therein that a court of inquiry was appointed under the order dated 23.10.1990 and the petitioner was directed to explain his version, therefore, on completion of inquiry the court was of the opinion that retention of the petitioner in employment of BSF was not desirable on account of his long unauthorised absence from duties

without any intimation to the competent authority. It is also stated by the respondents that a statutory petition under Section 28-A of the BSF Act was also filed by the petitioner and that too was rejected by the competent authority.

Heard counsel for the parties.

It is the position admitted that a court of inquiry was appointed by the respondents to inquire into the circumstances in which the petitioner over stayed on leave w.e.f. 18.8.1990. The respondents reached at the conclusion on basis of the recommendations made by the court of inquiry that retention of the petitioner in service is undesirable. The respondents in their reply in quite unambiguous terms averred the facts in this regard. The relevant portion of the reply is reproduced below:-

> "That in reply to para 18 of the writ petition it is admitted that a show cause notice was issued to the petitioner. However, before issuing the show cause notice a Court of Inquiry was ordered vide order No.4515-17 dated 23.10.90, a copy of which is placed on record and marked as Annexure R/4. The petitioner was directed to report back to duty vide letter dated 12.1.91, a copy of the said letter is annexed herewith and marked as Annexure R/5. A copy of show cause notice dated 1.4.91 is appended herewith and marked as Annexure R-

> 6. On completion of the enquiry, the Court was of the opinion that the retention of the petitioner in the employment of BSF was not desirable on account of his long un-authorised absence from duty without any intimation to the competent authority."

Rule 173 of the BSF Rules provides procedure of courts of inquiry. Sub Rule(8) of Rule 173 provides that before giving an opinion gainst any person subject to the Act the court will afford that person an opportunity to know all that has been stated against him, cross examine any witnesses who have given evidence against him and make a statement and called witnesses in his defence.

In the present case the respondents appointed the court of inquiry but failed to satisfy as to whether any opportunity was given to the petitioner to defend himself as prescribed under sub-rule(8) of Rule 173 of the Rules of 1969. In fact neither the record of the inquiry is produced by the respondents alongwith their reply nor is shown to the court at the time of hearing. This clearly shows that no opportunity to defend himself as prescribed under sub-rule(8) of Rule 173 was given by the respondents to the petitioner. The notice to show cause dated 1.4.1991 cannot be treated as a notice under sub-rule (8) as it pertains to tentative action of the respondents. In view of it the court of inquiry on

basis of which the petitioner was dismissed from services is laconic.

The counsel for the respondents vehemently stated that the services of the petitioner came to be terminated on ground of his conduct which rendered his retention in service undesirable. In such type of action there was no need to conduct any inquiry.

In support of the contention the counsel for the respondents placed reliance upon a judgment of Hon'ble Supreme Court in the case of Union of India & Ors. v. Rampal, reported in AIR 1996 SC 1500. In the case of Union of India v. Rampal (supra) the dismissal was not made by way of penalty but was in exercise of an independent and separate power conferred by Section 11 of the BSF Act, 1968.

In the present case the respondents in their reply in quite unambiguous terms stated that a court of inquiry was appointed and under its recommendation action was taken. As such the judgment reported i.e. Union of India v. Rampal (supra) was given in a case different on facts and the law laid down therein is having no application in instant controversy.

Counsel for the respondents also urged that there was no requirement of law to give reasons were required to be given while dismissing the petitioner

and to substantiate this contention he has placed reliance upon the judgment of Hon'ble Supreme Court in the case of S.N.Mukherjee v. Union of India, AIR 1990 SC 1984.

In the instant case the counsel for the petitioner no where stated or argued that the order of punishment is required to have reasons. In view of it the judgment cited by counsel for the respondents referred above is also of no consequence in the present controversy.

As a consequence of whatever discussion made above I am convinced that there is violation of sub-rule(8) of Rule 173 of the BSF Rules, 1969 which is mandatory in nature. The same makes the order impugned void.

Accordingly, this writ petition succeeds. The order impugned dated 20.4.1991 passed by the Commandant, 80 Battalion, BSF is hereby quashed. The petitioner is entitled for all consequential benefits.

(GOVIND MATHUR),J.

kkm/ps.